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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 518

EDWARD G. DOUGHERTY, *Petitioner*

v.

GENERAL MOTORS CORP.

Reply to Brief in Opposition to Petition for Writ of Certiorari

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Washington, D. C.
February , 1950.

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I

To support its contention that the decision below was correct, General Motors attempts to limit the escalator principle to seniority alone, and cites *Aeronautical Lodge* v. *Campbell* as authority. The case rather clearly stands for the opposite.[1] Respondent argues that the Act increases

[1] "Under the Act the veteran accumulates time toward his seniority while in service; *he also* becomes the beneficiary of those gains the achievement of which is the constant thrust of collective bargaining," and the veteran's "*rights, including* seniority" are within the ambit of the Act. *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 525, 527 (emphasis supplied).

the level of only those benefits based "on length of service alone," a principle inconsistent with a vast array of decisions. For example, the veteran is entitled to pay increases due, not to length of service, but to expansion of the enterprise, general rise in wage or salary levels, and war-induced prosperity. *Martin* v. *John S. Doane Co.*, 164 F. 2d 537 (CA 1, 1947); *Loeb* v. *Kivo*, 169 F. 2d 346 (CA 2, 1948); certiorari denied 335 U. S. 891; *Levine* v. *Berman*, 161 F. 2d 386 (CA 7, 1948), certiorari denied 332 U. S. 792.[2]

Apparently somewhat skeptical of this argument, General Motors abandons it by admitting that "such distinction (limiting the escalator to seniority) is one of accidental fact and not of principle." (Br. 11). Respondent then says that the "other benefits" clause of 8(c) is the only provision of the Act having any bearing on vacation pay.[3] It would construe the clause strictly, in isolation from the rest of the Act, so as to deny the benefit unless the rule is by its terms applicable to future years, including the one of the veteran's return. An agreement effective only for the year Dougherty was inducted, says General Motors, cannot be a "rule in effect at the time he was inducted." (Br. 2). How this squares with the literal language of the statutory clause, or with the *Fishgold* requirement of liberal construction in favor of the veteran, General Motors does not say. Nor does it explain what purpose or effect is left for this clause of the Act; under its view, the employer's rule

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[2] The reference is to the first decision in the Levine case.

[3] Respondent seems to attribute this view to petitioner also. (Br. 7) Petitioner's view is, and has always been, that the "other benefits" clause of 8(c) is *not a limit* to the level of benefits the Act guarantees the veteran, whatever might be its operation (1) to maintain unimpaired the veteran's vested interests in such benefits as contributory pension or insurance plans, or (2) to confer benefits where the rule in effect when the veteran was inducted has been revised to eliminate them. Petitioner devoted pages 9, 19, and 27 of his brief before the Court of Appeals to specific explanation of his views on this point, and his entire argument was permeated with and necessarily contained these views.

alone would always protect the veteran and make the Act superfluous.[4]

General Motors itself rebuts this argument by urging that Dougherty's vacation pay was compensation for work actually performed. (Br. 8).[5] If so, it falls squarely within the broad general guaranty of "seniority, status and pay" in 8(b), and the "other benefits" clause of 8(c) is not the sole governing provision. But even this argument has not got General Motors out of the wilderness: if vacation pay is "pay," General Motors can scarcely justify its refusal to pay veterans any portion of it simply because they had no 1945 earnings from which the amount could be computed.[6]

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[4] Dougherty does not urge the application of this clause to his case; he suggests only that the piecemeal construction of the Act advanced by General Motors would qualify him for vacation pay under the literal language of the Act. Petitioner makes this suggestion to demonstrate the difficulties and confusions inherent in General Motors' attempt to limit veterans to the status granted non-veteran employees on leave or furlough, and to show that the statute must be construed as a working whole.

[5] Petitioner does not understand General Motors to argue that 1946 vacation pay was compensation for work performed in 1945. This would contradict General Motors' view that annual negotiation of separate vacation pay agreements for each year requires each year to be considered apart from the others. (Br. 2) Moreover, such argument would seem difficult to sustain. Under the earlier agreements, the vacation pay in each year clearly was compensation (if it was) for the work of that year. The argument would therefore mean double vacation pay for 1945, and none for 1946. It would also render meaningless the agreement's alternative requirement of 26 weeks work in the period July 1945-June 1946. The phrase "percentage of 1945 earnings" replaced "96 hours pay", the only material change made in 1946; so the phrase apparently refers to the *amount* of Dougherty's vacation pay, not to what he has to do to get it. For these reasons, petitioner uses "level of benefits" and similar terms to describe his claim.

[6] Dougherty worked 8 months for General Motors without receiving any vacation pay. In fairness to him, it would seem that he should receive it to the extent it is compensation for performance of work. If vacation pay is partially a reward for loyalty to the employer and an antidote to job fatigue, Dougherty should receive it to this extent.

On discrimination, General Motors claims that so long as there is no intent to discriminate toward veterans, anything goes in collective bargaining agreements. (Br. 9). Lack of malice may be a necessary, but is surely not a sufficient, condition of the agreement's validity. Forgetfulness does not excuse compliance with statutory standards and an agreement pure in motive may be discriminatory in its effects, a condition the court below specifically noted here.[7]

II

Dougherty's case is unimportant says General Motors; it "does not present a fact pattern of such common occurrence as to impel this Court to grant certiorari." Whether a fact pattern affecting, by respondent's own admission, 50,000 people having similar rights under this identical contract (R. 1) is "common" enough need not be determined. For General Motors also argues that the numerous lower court decisions on the question are controlled by common principles and are in absolute harmony. However dubious the harmony, there is no doubt the principles are of general application. By urging that vacation pay is compensation for work performed, General Motors has shown that these principles may determine the proper rate of pay. And in citing the *Nevins* and *Harvey* cases, General Motors has indicated their extension to promotion questions; the decision below is inconsistent with *Morris* v. *C. & O. Railway*, 171 F. 2d 579 (CA 7, 1948), certiorari denied 336 U. S. 967, and *Conner* v. *Pennsylvania Railroad*, 177 F. 2d 854 (CA D. C., 1949), petition for certiorari pending, both holding that a returning veteran must be given promotion opportunities which he would have had by remaining at work instead of entering military service.

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[7] Neither petitioner nor the courts have suggested that General Motors or the union intended to discrimiate against veterans, but General Motors' disclaimers are conspicuous and strident. "If not chastely, at least cautiously."

Respondent's own argument reflects the prevailing confusion over the principles involved.

The statute and the escalator principle it embodies are flexible enough to meet the needs of veterans so as to make them as nearly whole as possible. To discard this principle in favor of a "leave of absence" standard, as respondent suggests, would create an undesirably rigid rule in which the facts and merits of such cases as Dougherty's are obscured. It would permit the Act to be vitiated as to promotions, seniority and general progression, by collective bargaining agreements denying credit in these respects to employees on leave of absence. The penalty against veterans would operate, not for one year, but on every future occasion when lack of credit for military service might bar them from the advantage.

Moreover, the "leave of absence" issue is only half the importance of this case. The other question, ignored by General Motors and so touched only collaterally herein, is whether the veteran is entited to the level of benefits received by employees who remained on the job during his military service. A negative answer to one of these questions does not necessarily imply a positive answer to the other.

Petitioner still thinks the writ should be granted, and respectfully requests that it issue.

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